2006

The State of Utah v. Raul Roberto Carrillo : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RAUL ROBERTO CARRILLO,	:	Case No. 20060766-CA
Defendant/Appellant.	:	

APPELLANT'S REPLY BRIEF

Appeal from a final judgment of conviction for Manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (2003), entered by the Honorable Deno Himonas, Third District Court, Salt Lake County, Utah. Appellant is incarcerated.

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SUMMARY

The distinction between the findings made at a bench trial and the findings made from a jury trial matter when reviewing a sufficiency challenge on appeal. Under the clearly erroneous standard applicable to this case, it is less difficult for the Appellant to meet his burden of demonstrating the trial court's finding was against the clear weight of the evidence. Appellant maintains, as outlined in his opening brief, that the evidence presented by the state at trial was insufficient to prove beyond a reasonable doubt that (1) he knew that his conduct of stabbing Daniel in the thigh with a small knife created a substantial risk of death; (2) he consciously disregarded that risk; and, (3) the risk was a type that an ordinary person would not have failed to recognize. Because Appellant's sufficiency argument on appeal does not rely on assertions that he was not the individual who committed the offense, detailed analysis of the transcript of his confession was unnecessary as those "facts" were presented at trial. Finally, Appellant's sufficiency

argument was preserved below and the invited error doctrine is inapplicable

POINT. APPELLANT HAS PROPERLY MARSHALLED THE EVIDENCE UNDER THE LESS EXACTING CLEARLY ERRONEOUS STANDARD TO SHOW THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT APPELLANT HAD THE REQUISITE INTENT TO SUSTAIN A CONVICTION FOR RECKLESS MANSLAUGHTER.

Because it is less difficult for an Appellant "to demonstrate that the evidence [at a bench trial] . . . is so wanting as to be 'clearly erroneous'" when the standard of proof is the "more exacting evidentiary standard" of beyond a reasonable doubt, the Appellant has met his burden of showing that his conviction for manslaughter was against the clear weight of the evidence. In re Z.D., 2006 UT 54, ¶40, 147 P.3d 401. Under the clearly erroneous standard, this Court's power in reviewing sufficiency claims is not as limited as it is with jury trials. Id.; State v. Rudolph, 2000 UT App 155, ¶22, 3 P.3d 192. When reviewing a jury trial verdict, this Court will only reverse

> after viewing the evidence and all inferences drawn therefrom in a light most favorable to the verdict, [it] find[s] that "the evidence to support the [jury] verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust."

Rudolph, 2000 UT App 155 at ¶22 (citation omitted).

By contrast, the Supreme Court has made it clear when reviewing the evidence from a bench trial, the evidence is not viewed in a light "most favorable to the appellee" nor is the appellee "given the benefit of all favorable inferences." In re Z.D., 2006 UT 54 at ¶¶32-35. Instead, while "scrutiny of the district judge's findings of fact . . . is deferential, . . . it is not abject. . . . [This Court] need not, to overturn a finding under the clear-error standard, adjudge the finding 'so unlikely that no reasonable person would

find it to be true.'" Id. at ¶34 (quotation and citation omitted). The decision to overturn will stem from "review of the 'whole record'" and consideration of the "heightened standards of proof." Id. at ¶37. Overturning findings as clearly erroneous is required in cases where "although there is evidence to support it" (Id. at ¶38), the appellate court is left with "a firm and definite conviction that a mistake has been made." Id. at ¶40.

As argued in Appellant's opening brief, the trial court's finding of reckless manslaughter was against the clear weight of the evidence presented by the state. See Appellant Opening Brief 18-25. Appellant's sufficiency argument on appeal does not rely on assertions that he was not the individual who committed the offense or that the police officers' failed to render medical help to Daniel as he bled profusely. Because Appellant's "confession" presented at trial only went to the issue of whether he was actually the perpetrator of this offense and not to his objective and subjective intent if he was, detailed analysis of the transcript is unnecessary in determining whether there was sufficient evidence. All the relevant facts surrounding the event and going to Appellant's intent were present at trial through testimony. Instead, Appellant's argument relies on whether the clear weight of the evidence established that he possessed the required intent. Appellant maintains that the facts as established at trial fail to support a finding beyond a reasonable doubt that he recklessly caused the death of Daniel. [1] See Appellant's

[1] The State correctly points out that references in the Appellant's opening brief to the preliminary hearing are not proper for the court to consider when reviewing whether there was sufficient evidence to support the conviction. See Appellee's Brief 23. However, most of the references are supported by the evidence presented at trial. Assertions made by Appellant, references to time before medical attention was given and blood squirting from Daniel's leg, not found in the trial transcript do not bear on whether

Opening Brief 14-25. Specifically, the state failed to prove under the narrow definition of "reckless" as set forth in Utah Code Ann. § 76-2-103(3) (2003), that Appellant actually knew that his conduct of sticking a small knife into Daniel's thigh created a "substantial and unjustifiable risk of death" (State v. Standiford, 769 P.2d 254, 263 (Utah 1988)), and he "consciously disregarded" the risk. State v. Robinson, 2003 UT App 1, ¶6, 63 P.3d 105.

References in Appellant's opening brief to the officers' lack of medical intervention simply add further support to Appellant's lack of intent argument in that an ordinary person would not perceive that a stab wound to the thigh with a small knife creates a substantial risk of death. See State v. Wessendorf, 777 P.2d 523, 526 (Utah Ct. App. 1989) (objective component of criminal recklessness requires the magnitude of the risk of death "be of such a degree that an ordinary person would not disregard or fail to recognize it"); Robinson, 2003 UT App 1 at ¶6 n.2 ("the determination to be made is whether the defendant was subjectively 'aware of but consciously disregarded' the risk his actions posed."). And while the state suggests that it is not required to prove that Appellant "knew of the exact location of the artery," to prove recklessness, it was required to prove "actual knowledge or awareness" that his act created a substantial and unjustifiable risk of death and that the risk was "of such a degree that an ordinary person would not disregard or fail to recognize it." Id. at ¶6 (citations omitted). The evidence does not bear this out.

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there was sufficient evidence to support that he had the requisite intent to support a conviction of reckless manslaughter.

Specifically, as argued in Appellant's opening brief, the medical examiner's testimony supports Appellant's assertion that under normal circumstances, sticking a small knife into the thigh of a healthy male individual is not ordinarily considered a substantial risk of death. For example, the medical examiner testified that Daniel "had died as a result of exsanguination, in other words bleeding to death, resulting from a stab wound of the left leg." R. 201:94. The depth of the stab wound was "three and a half inches. And what it struck was a major branch of the femoral artery, which is the main artery which provides blood to the leg." R. 201:97. The artery was not severed all the way through, "[i]t was a partial transaction. That's actually a little more dangerous of an injury than a complete cut." R. 201:102. "Arteries are elastic, so they are under some degree of tension. So if you cut it completely there is going to be a pulling back and somewhat of a self sealing of the artery. If you only cut it partially that pulling back and self sealing cannot occur, so it will bleed more copiously." R. 201:102. "Once an artery is cut, it will with every pulse of the heart, every beat of the heart, continue to leak blood until it is either closed, sutured, tied off." R. 201:97.

> Defense counsel: With a wound similar to the one you saw here, how long would it take to bleed out?
>
> Medical Examiner: I can't say with certainty. It would not be an immediately lethal injury. It would not be putting out huge amounts of blood. Predicting how long it would take, I can't do. But it would be a slowly evolving problem.
>
> Defense counsel: It would take a number of minutes?
>
> Medical Examiner: At least.
>
> Defense counsel: And if appropriate first aid had been applied, to a

reasonable degree of medical certainty, is it likely that he would have lived?

Medical Examiner: The sooner this individual received adequate care, the greater the likelihood he would have survived, yes.

Defense counsel: Hypothetically, if the evidence shows that 911 was called from the residence at nine minutes after 5:00, and that emergency medical help did not arrive until 5:15, would continued bleeding during that six-minute period be significant towards this person's prospects for living?

Medical Examiner: It would certainly have contributed to the deterioration in their condition, yes, if no pressure, tourniquet, any other methodologies of trying to slow down the bleeding had been applied.

Defense counsel: And it is your testimony that with this type of injury it is not the type that's going to stop on its own?

Medical Examiner: Very unlikely that this would self correct.

Defense counsel: Whereas, with a number of less-serious cuts, clotting will occur and, eventually, if they are not too serious, they will stop on their own?

Medical Examiner: Yes.

Defense counsel: But this one definitely required intervention?

Medical Examiner: Yes.

. . .

R. 201:105-06.

Defense counsel: Physiologically, did the vascular system on Daniel Johnson appear otherwise normal, other than this injury?

Medical Examiner: Yes.

Defense counsel: First aid should have worked on him, as it generally does with an average person?

Medical Examiner: First aid - -

Defense counsel: In terms of stopping the bleeding?

Medical Examiner: First aid would have certainly retarded the progression of his demise.

. . .

R. 201:108

On redirect, the medical examiner reiterated the effects of delayed medical intervention.

Prosecutor: With regard to the questions that [defense counsel] asked you, regarding treatment and proximity of treatment to injury, you indicated that the six-minute delay approximately between the 911 call and treatment could have been significant?

Medical Examiner: I said it would certainly play a role.

Prosecutor: Is that significance lessened or diminished in any way if those are minutes 13 to 19 following injury, as opposed to minutes one through six following injury?

Medical Examiner: Minutes 13 through 19 is when this person is becoming more and more irreversibly damaged. Minutes one through six probably aren't as crucial in terms of the irreversibility of the damage that they have sustained.

Prosecutor: But the 13 minutes it took to call 911 could have been just as damaging?

Medical Examiner: Certainly, if there is a – the longer the period of time before that six minutes, the more dangerous the situation.

R. 201:110-11.

The medical examiner's testimony supports Appellant's claim that this was a unique type of wound because the artery which happens to flow through this leg was only partially transected. Had it been completely transected a type of self-sealing would have occurred presumptively preventing it from continuing to bleed. There was no evidence presented that the Appellant had actual knowledge that a major artery flows through this

leg and that by sticking a small knife in the thigh the artery could be partially transected preventing it from self-sealing. Without a showing of the subjective elements of "actual knowledge or awareness" and a conscious disregard by Appellant of this risk, Appellant cannot be held liable for criminal recklessness. State v. Martinez, 2000 UT App 320, ¶12, n.5, 14 P.3d 114, *aff'd* State v. Martinez, 2002 UT 80, 52 P.3d 1276; see also State v. Howard, 597 P.2d 878, 881 (Utah 1979) (difference between recklessness and criminal negligence is whether defendant "was aware, but consciously disregarded a substantial risk" for recklessness; and whether defendant "was unaware but ought to have been aware of a substantial risk" for negligence).

Finally, the record does not support the state's claim that Appellant's argument is either unpreserved or was invited error. See Appellee Brief 27-36. A claim is preserved for appeal when it has been raised and the trial court has been "given an opportunity to address a claimed error and, if appropriate, correct it." State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346 (quotations and citations omitted). The preservation rule not only allows the trial court an opportunity to correct the alleged error but also prevents a defendant from "forgo[ing] . . . an objection with the strategy of 'enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, . . . claim[ing] on appeal that the Court should reverse.'" Id. (quotations and citations omitted). Similarly, the "invited error doctrine arises from the principle that a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error." Pratt v. Nelson, 2007 UT 41, ¶17, 164 P.3d 366.

The state claims that defense counsel conceded that "the State's evidence, if

believed, was sufficient to establish murder." Appellee Brief 28. In addition, the state argues that Appellant is claiming the evidence supports a finding of negligent homicide rather than reckless manslaughter and that this argument is unpreserved. See Appellee Brief 29. However, Appellant has never asserted that the evidence supports a finding of negligent homicide but has consistently argued that the evidence was insufficient to support a finding of recklessness as that term is defined statutorily. See generally Appellant's opening brief. References to negligent homicide were only used to provide the Court with the distinction between "actual awareness" of the risk created by the conduct required for recklessness and unawareness but "should have been" aware of the risk, required for criminal negligence. Appellant's opening brief 14-17. Therefore, no preservation problem exists regarding Appellant's sufficiency argument. In addition, as the following excerpt from the transcript shows, the state misunderstands defense counsel's argument and, therefore, the invited error doctrine is also inapplicable.

During opening argument, defense counsel argued that if the trial court believed that Appellant stabbed Daniel then this act would be homicide by assault. R. 201:24. The prosecutor in closing argued against the trial court's consideration either of homicide by assault or reckless manslaughter. R. 201:218-220, 246. During closing, defense counsel again reiterated his argument that Appellant was not guilty of the offense but "[i]f the Court does find that he is responsible, . . . the maximum he is guilty of is homicide by assault." R. 201:224-230, 238. Defense counsel began by stating

> In terms of finding Raul Carrillo guilty of this offense, I see it as the Court having two possible ways of getting there. One is to believe that he confessed to the officers that he stabbed Daniel Johnson. The other is to

believe Chelsea Stout and her testimony that that is what she saw.

R. 201:224-225.

Defense counsel then proceeded to address why there was not believable evidence to support either of these "possible ways." R. 201:224-233. The state construes defense counsel's argument as invited error. See Appellee's Brief 27-31. The state's argument fails to recognize that defense counsel was setting up his argument so as to counter that there was believable evidence regarding the elements of murder. Furthermore, the trial court did not accept the state's theory that Appellant possessed the requisite intent to support a finding of first degree murder. R. 201:265. Therefore, the only issue before this Court is whether there was sufficient evidence to support a finding that Appellant "acted recklessly, as that term is defined by the Utah criminal code, and that he recklessly caused the death of Daniel Johnson." R. 201:265. Viewing the relevant portions of defense counsel's argument in context further supports that no concession was made regarding Appellant's mental state. After countering the state's theory that there was believable evidence to support a murder conviction, defense counsel argued the following:

> Homicide by assault, and I would point out to the Court that an aggravated assault is an assault. It absolutely meets the definition of homicide by assault.
>
> . . .
>
> A knife wound generally isn't fatal. There are exceptions. Stab somebody in the throat or neck, boom, serious problems. Stab somebody in the heart, boom, serious problems. Stab somebody elsewhere in the chest, we are down a level, still extremely threatening, a serious problem, but not as immediately life threatening as a neck or a heart wound.
>
> Stab somebody in the thigh, what's supposed to happen with that? It is

supposed to hurt. It is supposed to bleed a little bit. They are supposed to get a couple of stitches. They are supposed to be okay.

. . .

What happened in this case, convergence of two necessary things. Number one, it was a very unique wound, partially transecting the artery. If it had missed the artery, no problem, . . ., go get a couple of stitches, good to go. If it had completely transected the artery, again, the artery would pinch off itself. . . . It is this unique type of wound, number one.

Number two, lack of first aid. . . .

. . .

. . . And when someone stabs someone in the leg, they are not expecting, hey, I am going to get lucky and partially transect a major branch of the femoral artery, and then maybe the guy won't get first aid and I might get lucky and get a kill. That's not the thought process....

It is not an intent to try to kill. You try to kill, throat, chest, or multiple, again and again and again and again, cases where we have 15, 20, 30 stab wounds, yeah, there you have got an intent. It is evident.

. . .

If the Court finds that Raul Carrillo is responsible for this, what level of offense should he be guilty of? You saw the interview there. I think it is clear from that he never intended to kill anybody. . . . The nature, the location of the wound. Lower thigh. That's not where you go to kill somebody. . . . It doesn't have the intent to cause serious bodily injury.

If the Court doesn't buy that argument and finds that there is the intent to do serious bodily injury here, I would submit the most we can get is manslaughter. . . .

. . .

I would submit the wound, the location, that there is only one, indicates only an intent to cause bodily injury. There is no intent to cause something life threatening. In the ordinary course, . . ., this wouldn't be a life-threatening wound.

In sum, I would ask . . . the Court to find Raul Carrillo not guilty. If the Court does find that he is responsible, I would suggest that the maximum he is guilty of is homicide by assault.

R. 201:233-238.

None of defense counsel's closing arguments can be considered a "concession[] or

omission[] . . . bar[ring] consideration of the claim." See Appellee Brief 33. Instead, defense counsel's argument consistently has been that Appellant is not guilty of this offense but if the Court does find that he stabbed Daniel then the evidence at most shows that his intent was to only cause bodily injury. Thus Appellant's insufficient evidence argument was preserved and the invited error doctrine does not apply.

CONCLUSION

For the reasons stated above and more fully set out in Appellant's opening brief, Carrillo respectfully requests this Court to reverse his conviction for reckless manslaughter.

SUBMITTED this 13th day of September, 2007.

DEBRA M. NELSON
MARIE MAXWELL
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 13th day of September, 2007.

DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 13 day of September, 2007.

H. V.